## APPENDIX A.

**Opinion and Judgment of the Court of Appeals for the Third Circuit.**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16236

GLO CO., AN ILLINOIS CORPORATION,
*Appellant,*

*v.*

MURCHISON AND COMPANY, A DELAWARE CORPORATION, AND SUNRAY DX OIL COMPANY, A DELAWARE CORPORATION

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Argued April 18, 1967

Before SMITH and FREEDMAN, *Circuit Judges* and WORTENDYKE, *District Judge*

### OPINION OF THE COURT

(Filed December 20, 1967)

PER CURIAM.

This is an appeal from orders of the United States District Court for the District of Delaware dismissing an action to enforce plaintiff's rights under contracts made with defendants. The order of dismissal for failure to prosecute was based upon the court's own motion under

Civil Rule 12 of the United States District Court for the District of Delaware.[1]

The present action was commenced on November 1, 1954. On September 18, 1963, the District Court issued an order to show cause why the case should not be dismissed for lack of prosecution. At oral argument, on its return, the Court warned plaintiff's counsel that no further delay would be tolerated. The Court then dismissed the rule to show cause. Upon return of a subsequent order to show cause, issued on June 3, 1966, plaintiff's counsel assured the Court that the matter would be moved for trial. Nevertheless, the Court dismissed plaintiff's case with prejudice and refused to reopen on motion for reargument. Plaintiff says that the dismissal was an abuse of judicial discretion.

The Court has a wide discretion as to penalties for failure of diligent prosecution. Lyford v. Carter, 274 F. 2d 815 (3rd Cir. 1960). A dismissal of this case certainly appears justified by the inaction of counsel in failing to move for trial after repeated warnings by the court. However, a dismissal with prejudice is an extremely harsh penalty for such delay.

As the Court recognized, there appears to be no dispute that an amount of money is owed to plaintiff under the contracts in suit. A dismissal with prejudice has the effect of stripping plaintiff of the power to enforce these contract rights. Even the Court below intimated that this was not the result it wanted to bring about, stating: "My point is

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1. Rule 12 provides:

Subject to the provisions of Rule 23(c), F. R. C. P., in each cause pending, wherein no action has been taken for a period of one year, the Court may, on its own motion . . . enter an order dismissing such cause unless good reason for the inaction is given. An application for a continuance shall not be deemed to be action precluding such dismissal. After any such action for dismissal has been filed, no application for a continuance or any proceeding taken under the discovery rules, F. R. C. P., shall be deemed to toll the application of this Rule.

merely that with respect to that [the amount of money owed] I certainly don't want to dismiss a suit where somebody says 'I owe somebody some money'; but on the other hand I am considering very seriously dismissing this suit, and I don't want to do anything that is detrimental to a party who has a perfectly legitimate right, which the other side does not deny. . . . The only thing I would like to do in the event I do dismiss this is to keep that matter open, so that if it does require litigation, or the parties can't settle as to the amount that is due . . . then it can be determined by the Court in the usual and proper manner." We agree that this should be the result. To that end the cause should be reinstated and brought to trial with all convenient speed.

The judgment of the District Court is reversed, and the cause remanded for further proceedings not inconsistent with the views herein expressed.

Judge Smith did not participate in the decision of this case because of illness.

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the orders of the said District Court, filed August 11, 1966 and August 24, 1966, be, and the same are hereby reversed, with costs, and the cause remanded for further proceedings not inconsistent with the opinion of this Court.

Attest:
THOMAS F. QUINN,
*Clerk.*

December 20, 1967

## APPENDIX B.

**Opinion and Judgment of the Court of Appeals for the Third Circuit on Rehearing.**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16236

GLO CO., AN ILLINOIS CORPORATION,
*Appellant,*

*v.*

MURCHISON AND COMPANY, A DELAWARE CORPORATION,
AND SUNRAY DX OIL COMPANY,
A DELAWARE CORPORATION

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Argued April 18, 1967

Before SMITH and FREEDMAN, *Circuit Judges* and WORTENDYKE, *District Judge*

Reargued February 20, 1968

Before KALODNER, FREEDMAN and VAN DUSEN, *Circuit Judges*

## OPINION ON REHEARING.

(Filed March 20, 1968)

PER CURIAM:

This is an old suit which the district court, acting on its own motion, dismissed with prejudice under its Local Rule 12 which authorizes such disposition where no action has been taken for a period of one year.[1]

We have the utmost sympathy with the desire of the district court to enforce its Local Rule 12. However, after consideration of the complex factual circumstances of the case, we conclude with the greatest reluctance that in view of the unusual nature of the circumstances of this case the interest of justice will best be served by affording plaintiff an opportunity to prove its case at trial.

We therefore set aside the dismissal of the action by the district court, which should fix a specific time for the trial of the case at which plaintiff will have the opportunity to go forward on pain of dismissal with prejudice for lack of prosecution.

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VAN DUSEN, *Circuit Judge,* dissenting

In view of the record in this case, I dissent respectfully from the majority opinion. This suit was started on November 1, 1954. In spite of the district court rule quoted

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1. Local Rule 12 provides:

"Subject to the provisions of Rule 23(c), F. R. C. P., in each cause pending, wherein no action has been taken for a period of one year, the Court may, on its own motion or upon application of any party and after reasonable notice, enter an order dismissing such cause unless good reason for the inaction is given. An application for a continuance shall not be deemed to be action precluding such dismissal. After any such application for dismissal has been filed, no application for a continuance or any proceeding taken under the discovery rules, F. R. C. P., shall be deemed to toll the application of this Rule."

in the majority opinion providing for dismissal in cases "wherein no action has been taken for a period of one year", at least five periods of no action by plaintiff for over a year[1] as well as numerous warnings of dismissal to counsel for plaintiff occurred before the case was finally dismissed in August, 1966 and the Motion for Reargument and To Alter and Amend the Judgment of Dismissal was denied. These warnings were as follows:

1. On September 2, 1959, the Clerk wrote plaintiff that the case would be dismissed for lack of prosecution unless some action were taken by October 6 (92a) and on September 29, plaintiff filed a motion for partial summary judgment, which was withdrawn five years later.

2. On September 18, 1963, the court on its own motion ordered that the action would be dismissed "unless good reason for the inaction is shown at a hearing fixed for . . ." September 27, 1963.

3. On September 24, 1964, the Chief Judge held a conference at which he gave plaintiff's counsel this warning (11b):

> ". . . I will tell you this: that if this case is not dismissed, Mr. Wilson, you had better watch yourself and comply with these rules and go ahead with this. Because I am not going to tolerate any further delay in this matter. If you are not ready for trial, if you don't want to try this case, say you don't want to try it and dismiss it. But something has got to be done about it. We are not going to let these cases hang along, here, for no good reason except the lack of diligence on the part of counsel."

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1. January 1, 1957 to September 29, 1959, December 1959 to September 1961, September 19, 1961 to October 10, 1961 & October 12, 1961 to September 19, 1963, September 21, 1963 to September 20, 1964, and January 1965 to June 3, 1966. See Docket Entries at Ia-IVa.

4. In April, 1966, plaintiff answered a letter from the law clerk of the Chief Judge asking the status of the case by saying that he was preparing some interrogatories (18b-19b and 95a) but he filed nothing until after the Chief Judge entered the following order on June 3, 1966 (77a):

> "AND NOW, to-wit, this third day of June, 1966, it appearing that no action has been taken in the above case for a period of one year from this date, it is
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> "ORDERED by the Court on its own motion that the action will be dismissed pursuant to Rule 12 of this Court unless good reason for the inaction is shown at a hearing hereby fixed for 10:00 a.m., June 27, 1966."

After the hearing on June 27, the Chief Judge found there was no good reason for the above-described inaction in a Memorandum Opinion filed August, 1966 (92a-96a) where this language appears at 95a-96a:

> "At the hearing on the present show cause order, plaintiff again assured the Court that the action would be moved for trial. However, after the repeated warnings by the Court and the past assurances by plaintiff that this action would be tried shortly, the Court no longer feels justified in allowing this action to remain on its docket to serve as a sword over defendants' heads. The Court will not subject defendants to any more show cause hearings."

The Supreme Court of the United States has held that a district court judge has the discretion to dismiss an action under such circumstances irrespective of the existence of a Rule such as Local Rule 12. See *Link v. Wabash Railroad Co.*, 370 U. S. 626, 633-43 (1962) [2] where the court said:

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2. In the *Link* case, *supra*, the court used this language at pp. 629-631:

> "The authority of a federal trial court to dismiss a plaintiff's action with prejudice because of his failure to prosecute can-

"Accordingly, when circumstances make such action appropriate, a District Court may dismiss a complaint for failure to prosecute even without affording notice of its intention to do so or providing an adversary hearing before acting. Whether such an order can stand on appeal depends not on power but on whether it was within the permissible range of the court's discretion . . .

"There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.' *Smith v. Ayer*, 101 U. S. 320, 326."

This court has recently followed the holding in the *Link* case, *supra*, in at least two cases:

In *Torino v. Texaco, Inc.*, 378 F. 2d 268, 270 (3d Cir. 1967), this court said:

"In *Link*, the Supreme Court stated that the 'inherent power' of a court to *sua sponte* dismiss a case for want of prosecution had not been disturbed by Fed-

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not seriously be doubted. The power to invoke this sanction is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts. . . .

"The authority of a court to dismiss *sua sponte* for lack of prosecution has generally been considered an 'inherent power,' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."

eral Civil Procedure Rule 41(b), and held that the dismissal did not constitute an abuse of discretion especially when *all* the circumstances of the case were considered. Here, as in *Link*, there were numerous instances of delays; and the district court stated that it relied upon all of them in dismissing. Considering the totality of circumstances as they existed before the district court, we cannot conclude that the district court abused its discretion."

In *Kenney v. California Tanker Company*, 381 F. 2d 775, 778 (3d Cir. 1967), cert. denied, — U. S. —, 36 L. Week 3295 (Jan. 22, 1968), this language was used:

> "Here the libellant was warned over two years before the final order of dismissal that the case would be dismissed if he did not make efforts to prosecute the case, but the record clearly indicates that libellant made only token efforts toward this end. A myriad of cases could be cited for the proposition that we will not reverse the district court's dismissal absent a clear abuse of discretion, . . ."

Such holdings are consistent with those by other courts of appeals. See, for example, *Hicks v. Bekins Moving & Storage Co.*, 115 F. 2d 406, 409 (9th Cir. 1940); *Shotkin v. Westinghouse Electric & Mfg. Co.*, 169 F. 2d 825, 826 (10th Cir. 1948); *Fitzsimmons v. Gilpin*, 368 F. 2d 561, 562 (9th Cir. 1966); and cases cited in those cases.

The death and incapacity of two principal witnesses for defendants during this period of over 11 years between November, 1954 and June, 1966 (T. F. Murchison died in November, 1955, see 16b-17b & 35b and P. H. Swearingen, Esq., has been incapacitated at least since June, 1966, see 89a, 35b & 36b) certainly could be found to be prejudicial to defendants even though such prejudice is not required to

justify a dismissal for lack of due diligence by plaintiff. See *Messenger v. United States*, 231 F. 2d 328, 331 (2nd Cir. 1956).

A careful review of this record discloses no abuse of discretion in the order of the district court dismissing this action.[3] As stated in the *Fitzsimmons* case, *supra*, at 562:

> "On this record appellant left the court no alternative but to grant the motion or countenance a flat and unexplained disregard of the court's rules."

On this record, I would affirm the action of the district court.

## JUDGMENT ON REHEARING.

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the orders of the said District Court, filed August 11, 1966 and August 24, 1966, be, and the same are hereby reversed, with costs, and the cause remanded with the direction that the District Court fix a specific time for the trial of the case at which plaintiff will have the opportunity to go forward on pain of dismissal with prejudice for lack of prosecution.

ATTEST:
THOMAS F. QUINN,
*Clerk.*

March 20, 1968

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3. For example, no motion to set the case for trial was ever filed between 1954 and June, 1966 as required by the district court's Local Rule 13(B). The last of several promises by plaintiff that it could be ready for trial was at the calendar call of September 21, 1965 when counsel assured the court "this case can be tried this spring" (see page 13 of appellant's brief) but, as noted above, no motion had been filed by June 3.

## APPENDIX C.

**Memorandum Opinion and Order of the United States District Court for the District of Delaware.**

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CIVIL ACTION No. 1659

GLO CO., AN ILLINOIS CORPORATION,
*Plaintiff*,

*v.*

MURCHISON AND COMPANY, A DELAWARE CORPORATION, BARNSDALL OIL COMPANY, A DELAWARE CORPORATION, AND SUNRAY OIL CORPORATION, A DELAWARE CORPORATION,
*Defendants.*

WILLIAM T. LYNAM, III, ESQUIRE, of WILSON AND LYNAM, Wilmington, Delaware, for plaintiff;

WILLIAM S. MEGONIGAL, JR., ESQUIRE, of MORRIS, NICHOLS, ARSHT & TUNNELL, Wilmington, Delaware, for defendant, MURCHISON AND COMPANY;

ROBERT H. RICHARDS, JR., ESQUIRE, of RICHARDS, LAYTON & FINGER, Wilmington, Delaware, for defendant, SUNRAY OIL CORPORATION.

## MEMORANDUM OPINION.

WRIGHT, *Chief Judge.*

This Court, on its own motion in accordance with the Civil Rules of the United States District Court for the District of Delaware, Rule 12, issued a rule to show cause on June 3, 1966, why this case should not be dismissed for lack of prosecution. A short recital of the history of this case will show why the case should be dismissed.

The complaint was filed on November 1, 1954 and charged the various defendants with violating a contract concerning certain oil leases. Answers were filed by defendant, Murchison and Company, and defendant, Sunray, on December 23, 1954 and on January 13, 1955, Murchison and Company filed an answer to the cross claim of Sunray Oil Corporation. Discovery was begun and eventually an argument concerning Sunray's objections to plaintiff's interrogatories was scheduled for January 7, 1957. Plaintiff, by letter of January 3, 1957, withdrew its interrogatories and the argument was cancelled.

With the exception of the withdrawal by one of defendants' counsel, the case then laid dormant until September 2, 1959 when the clerk for the United States District Court for the District of Delaware wrote counsel informing them the case would be dismissed for lack of prosecution unless some action were taken by October 6, 1959.

On September 29, 1959, seven days before the date on which dismissal was to occur, plaintiff filed a motion for partial summary judgment. Nothing further was done concerning this motion until plaintiff withdrew it on October 5, 1964.

On September 18, 1961, plaintiff again filed various motions including a request for permission to amend the com-

plaint. The motions were then set for hearing on October 18, 1961; however, all counsel in the case wrote to the Court requesting the hearing be cancelled since the motions were not ripe for argument.

For the next two years nothing further was done in the case. On September 18, 1963, this Court issued an order to show cause, returnable on September 27, 1963, why the case should not be dismissed for lack of prosecution.

On September 19, 1963, counsel for plaintiff wrote the Court:

> "It is my expectation that shortly after the filing of answers to the amended Complaint, this matter may be set down for trial. It may be that defendants will wish to press their motions for summary judgment, but it is my belief that the amended Complaint avoids the necessity for disposing of that motion."

At the subsequent oral argument the Court warned plaintiff's counsel that no further delay would be tolerated. The Court said:

> "But I will tell you this: that if this case is not dismissed, * * * you had better watch yourself and comply with these rules and go ahead with this. Because I am not going to tolerate any further delay in this matter. If you are not ready for trial, if you don't want to try this case, say you don't want to try it and dismiss it. But something has got to be done about it. We are not going to let these cases hang along, here, for no good reason except the lack of diligence on the part of counsel."

Subsequently, the Court dismissed the rule to show cause.

After the call of the calendar in September 1964, plaintiff in an explanatory letter of September 17, 1964 to the

Court again represented that the case would be tried without delay. Plaintiff stated:

> "Unless the Court takes action precluding such a course, plaintiff plans, within the next two weeks, to do the following:
>
> a) Bring on a motion for leave to amend the complaint in the form already agreed to by both defendants.
>
> b) If the motion is granted, await defendants' answers to the amended complaint.
>
> c) List the matter for trial as soon as defendants' answers are received.
>
> Since the entire action turns on the construction of certain documents, it seems unlikely that protracted discovery will be necessary. Assuming that there are no further delays, it is not unreasonable to hope that the action may be terminated by March of 1965."

On October 16, 1964, the amended complaint was allowed upon stipulation of the parties. On January 15, 1965 and January 18, 1965, answers were filed by the two defendants. Although the case was now ready for trial from the plaintiff's point of view (see quotes from plaintiff's letters of September 19, 1963 and September 17, 1964, supra), no motion was filed by plaintiff to set a trial date.

The case again lay dormant and upon the call of the calendar on September 21, 1965 plaintiff again assured the Court the case would be tried soon. Plaintiff stated:

> "Our counsel from Chicago tells us quite clearly that if some answers to interrogatories may be had this case can be tried this spring, and he assured me of that."

No interrogatories were filed prior to the spring of 1966.

On April 18, 1966, upon the direction of the Court, a letter was sent to counsel asking them the status of the case. Plaintiff responded and stated:

> "I am in the process of preparing some additional interrogatories. Moreover, there is outstanding some objections by Sunray to written interrogatories. This defendant did file a brief in support of its objections on January 4, 1957. I shall undertake to answer this brief some time within the next thirty days."

The interrogatories referred to in the above quote had been withdrawn by plaintiff by letter to the Court on January 3, 1957.

Finally, the present order to show cause was issued on June 3, 1966 since the plaintiff had done nothing further. On June 7, 1966, plaintiff filed various additional interrogatories, most of which had previously been answered or else had been asked in 1956 and had been withdrawn by plaintiff on January 3, 1957.

At the hearing on the present show cause order, plaintiff again assured the Court that the action would be moved for trial. However, after the repeated warnings by the Court and the past assurances by plaintiff that this action would be tried shortly, the Court no longer feels justified in allowing this action to remain on its docket to serve as a sword over defendants' heads. The Court will not subject defendants to any more show cause hearings.

The rule is made absolute.

Submit order.

Wilmington, Delaware
August 10, 1966

## ORDER.

And Now, to Wit, this 11th day of August, 1966, the Court, of its own motion, having on June 3, 1966 issued a rule to show cause why the above action should not be dismissed, returnable on June 27, 1966, and said rule to show cause having come on before the Court on June 27, 1966, and having been fully argued, upon the Opinion of the Court dated August 10, 1966,

It Is Ordered that said rule to show cause is made absolute and the above entitled cause is hereby dismissed with costs to be taxed against the plaintiff.

Caleb M. Wright, *C. D. J.*